

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

Paper No. 21

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte AJAZ S. HUSSAIN and RAKESH GOVIND

Appeal No. 1999-1349
Application No. 08/110,115

ON BRIEF

Before PAK, WARREN and KRATZ, Administrative Patent Judges.
KRATZ, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 1-6 and 8-12, which are all of the claims pending in this application.

BACKGROUND

Appellants' invention relates to a liquid composition for use in cooling skin, and methods of use of the composition. An understanding of the invention can be derived from a reading of exemplary claim 1, which is reproduced below.

1. A non-ozone depleting, non-toxic and non-carcinogenic vapocoorant liquid chemical composition for use in localized cooling of a desired area of the skin of humans and other animals and in conjunction with the spray and stretch treatment technique, said composition:

comprising by total weight of the composition 40 to 55% hydrofluorocarbon selected from the group consisting of 1,1-difluorocarbon selected from the group consisting of 1,1-difluorocarbon, 1,1,1,2-tetrafluoroethane, 1,3-trifluoro-2-fluoro propane, and mixtures thereof, and 60 to 45% of ethyl alcohol; being substantially free of chlorinated fluorocarbons; and

being capable of cooling said desired area to at least as low as approximately minus 5°C, upon spraying of said composition onto said desired area, for a maximum of 5 seconds.

The prior art references of record relied upon by the examiner in rejecting the appealed claims are:

Bargigia et al. (Bargigia)	4,198,313	Apr. 15, 1980
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Seney	4,646,735	Mar. 03, 1987
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McDow	5,330,745	Jul. 19, 1994
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Remington's Pharmaceutical Sciences (Remington), 17th Ed., 1985, p.1307.

Heiskel et al. (Heiskel), Chemical Abstracts 114:108708y (1991).

Claims 1-6 and 8-12 stand rejected under 35 U.S.C. § 112, second paragraph as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as invention. Claims 1 and 8-11 stand rejected under 35 U.S.C. § 103 as being unpatentable over Seney in view of Bargigia. Claim 2 stands rejected under 35 U.S.C. § 103 as being unpatentable over Seney in view of Bargigia and Remington. Claims 3-6 stand rejected under 35 U.S.C. § 103 as being unpatentable over Seney in view of Bargigia, Remington and McDow. Claim 12 stands rejected under 35 U.S.C. § 103 as being unpatentable over Seney in view of Bargigia, Remington and Heiskel.

We refer to the brief and reply brief and to the answer for a complete exposition of the opposing viewpoints expressed by appellants and the examiner concerning the issues before us on this appeal.

OPINION

Upon careful consideration of appellants' specification and the claims on appeal, the evidence of obviousness relied upon by the examiner, and the opposing arguments presented by appellants and the examiner, we find that the aforementioned § 112, second

paragraph and § 103 rejections are not well founded.

Accordingly, we will not sustain the examiner's rejections.

Rejection under 35 U.S.C. § 112, second paragraph

The relevant inquiry under 35 U.S.C. § 112, second paragraph, is whether the claim language, as it would have been interpreted by one of ordinary skill in the art in light of appellants' specification and the prior art, sets out and circumscribes a particular area with a reasonable degree of precision and particularity. See In re Moore, 439 F.2d 1232, 1235, 169 USPQ 236, 238 (CCPA 1971).

The examiner's concern is with an alleged ambiguity in appellants' use of the claim language "at least as low as approximately minus 5°C" and "for a period of no more than about 5 seconds" as appear in the appealed claims.¹ According to the examiner, the use of those phrases results in the recitation of a broad range or limitation together with a narrow range or limitation rendering the claims indefinite.

Subjective terms such as "approximately," and "about" are not necessarily indefinite and unclear. When a word of degree is used, the question is whether one of ordinary skill in the

¹ The latter phrase only appears in claims 8-11.

pertinent art would understand what is claimed when the claim is read in light of the specification. See Andrew Corp. v. Gabriel Electronics, 847 F.2d 819, 821-22, 6 USPQ2d 2010, 2012-13 (Fed. Cir. 1988); Seattle Box Co., Inc. v. Industrial Crating & Packing, Inc., 731 F.2d 818, 826, 221 USPQ 568, 573-74 (Fed. Cir. 1984). Here, the examiner acknowledges that "approximately minus 5°C" is reasonably definite at pages 8 and 9 of the answer. Moreover, the examiner maintains that it is the modification of the term "about 5 seconds" with the phrase "for a period of no more than" that results in uncertainty, not the term "about 5 seconds" per se.

We cannot agree with the examiner's position on this record. As explained by appellants (reply brief, page 2), the position of the examiner espoused in the answer with respect to this issue is illogical. Consequently, the examiner has not met the burden of explaining how the appealed claims run afoul of the provisions of the second paragraph of 35 U.S.C. § 112. Accordingly, we reverse the examiner's rejection under the second paragraph of 35 U.S.C. § 112.

Rejections under 35 U.S.C. § 103

Beginning with the examiner's rejection of claims 1 and 8-11, we note that the examiner acknowledges that Seney does not

teach a composition as required by all of the rejected claims. Indeed, independent claim 1 and the other appealed claims require a vapocoolant liquid composition that includes 40 to 55 weight percent of a hydro fluorocarbon selected from 1,1-difluoroethane, 1,1,1,2-tetrafluoroethane, 1,3-trifluoro-2-fluoro propane, and mixtures thereof together with 60 to 45 percent of ethyl alcohol with the proviso that the composition is substantially free of chlorinated hydrocarbons. Seney, on the other hand, is interested in generating a low temperature air blanket over tissues that are involved in medical care and for which the patient may need pain relief. A hand piece is formed having a closed refrigeration cycle with a refrigerant such as Freon being employed to cool a forced flow of sterilized air. See, e.g., columns 1 and 2 of Seney.

Bargigia, the other applied reference, is concerned with propellant compositions for aerosols which can be used for supplying paints, anti-perspiration products, insecticides, home cleaning products, etc. See, e.g., the abstract and column 4, lines 27-34 of Bargigia. Bargigia (column 2) may use fluorinated or chlorofluorinated components in the propellant composition together with hydrocarbons and specified halogenated organic

components A along with other additives including dispersing agents and other auxiliaries. See column 4 of Bargigia.

Like appellants, we fail to see how the disparate teachings of Bargigia is combinable with Seney in any manner, let alone in a manner that would result in appellants' composition. Nor has the examiner fairly established that Bargigia alone would have suggested appellants' composition or methods of using same. While Bargigia may refer to some fluorinated propellants and refer to the possible use of a variety of dispersing aids such as water and organic solvents, including alcohols, the examiner has not convincingly explained how the referenced passages in columns 2 and 4 of Bargigia would have suggested a composition with the specified amounts of ethyl alcohol and amounts of specified hydro fluorocarbons as here claimed.

Similarly, the examiner has not established how the other applied references would make up for the deficiencies of the teachings of Seney and Bargigia with respect to the here claimed subject matter. Consequently, for the reasons set forth above and in appellants' briefs, we will not sustain any of the examiner's § 103 rejections.

CONCLUSION

The decision of the examiner to reject claims 1-6 and 8-12 under 35 U.S.C. § 112, second paragraph as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicants regard as invention; to reject claims 1 and 8-11 under 35 U.S.C. § 103 as being unpatentable over Seney in view of Bargigia; to reject claim 2 under 35 U.S.C. § 103 as being unpatentable over Seney in view of Bargigia and Remington; to reject claims 3-6 under 35 U.S.C. § 103 as being unpatentable over Seney in view of Bargigia, Remington and McDow; and to reject claim 12 under 35 U.S.C. § 103 as being unpatentable over Seney in view of Bargigia, Remington and Heiskel is reversed.

REVERSED

CHUNG K. PAK)	
Administrative Patent Judge)	
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)	BOARD OF PATENT
CHARLES F. WARREN)	APPEALS
Administrative Patent Judge)	AND
)	INTERFERENCES
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PETER F. KRATZ)	
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Appeal No. 1999-1349
Application No. 08/110,115

Page 10

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